



[Billing Code: 6750-01-S]

## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 18**

#### **Guides for the Nursery Industry**

**AGENCY:** Federal Trade Commission.

**ACTION:** Rescission of the Guides for the Nursery Industry.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) has completed its review of the Guides for the Nursery Industry (“Nursery Guides” or “Guides”) as part of its systematic review of all current Commission regulations and guides. Pursuant to that review, the Commission now rescinds the Guides.

**DATES:** The rescission is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Copies of this document are available on the Commission’s website, [www.ftc.gov](http://www.ftc.gov).

**FOR FURTHER INFORMATION CONTACT:** Hampton Newsome, (202) 326-2889, Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

The Commission issued the Guides for the Nursery Industry in 1979.<sup>1</sup> These

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<sup>1</sup> The Commission issued the Guides in 1979 (44 FR 11176 (Feb. 27, 1979)) to replace trade practice rules for the nursery industry (16 CFR Part 34) first promulgated in the 1950s (23 FR 4803 (June 28, 1958)). The Guides were intended to help marketers avoid making claims that are unfair or deceptive under Section 5 of the FTC Act, 15 U.S.C. 45.

Guides address various sales claims for outdoor plants, including representations regarding quantity, size, grade, kind, species, age, maturity, condition, vigor, hardiness, growth ability, price, and origin or place where grown. The Commission amended the Guides in 1994 to update legal terminology, and again in 2007 to make a technical correction.<sup>2</sup>

The Commission reviews its rules and guides periodically to seek information about their costs and benefits to consumers and businesses, regulatory and economic impact, and general effectiveness in protecting consumers and helping industry avoid deceptive claims. These reviews assist the Commission in identifying rules and guides that warrant modification or rescission.

On February 22, 2018, the Commission initiated its scheduled regulatory review of the Nursery Guides and solicited public comment on several issues.<sup>3</sup> Specifically, the Commission sought input on the continuing need for the Guides; their economic impact; possible conflict between the Guides and state, local, federal, or international laws; and the effect of any technological, economic, environmental, or other industry changes. The Commission also solicited comment on issues specific to the Guides, such as whether the Commission should update plant classification references. In response, the Commission received one comment from the National Federation of Independent Business (“NFIB”). NFIB argued the Commission should rescind the Guides because they are an unnecessary

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Industry guides, such as the Nursery Guides, are administrative interpretations of laws administered by the Commission. They do not have the force of law and are not independently enforceable. Failure to follow industry guides may result, however, in enforcement action under the FTC Act, 15 U.S.C. 45. In any such action, the Commission must prove that the act or practice at issue is unfair or deceptive in violation of Section 5 of the FTC Act.

<sup>2</sup> See 59 FR 64546 (Dec. 14, 1994); 72 FR 901 (Jan. 9, 2007).

<sup>3</sup> See 83 FR 7643 (Feb. 22, 2018).

federal regulatory burden. NFIB also contended that regulation or guidance concerning the nursery business is more properly conducted at the state, rather than federal, level.

Based on the lack of comments, as well as the paucity of consumer complaints and the lack of need for law enforcement action over the past two decades, on September 10, 2018 (83 FR 45582), the Commission published a Notice of Proposed Rulemaking (“NPRM”) seeking comments on a proposed rescission of the Guides. The Commission stated that the Guides no longer appear necessary, and thus serve little purpose to industry or consumers. Specifically, the types of practices detailed in the Guides do not appear to be prevalent in the nursery industry; little evidence exists that industry members currently use the Guides to help avoid deceptive practices; and rescission will have no impact on the FTC’s ability to address unfair and deceptive practices in the nursery industry.

## **II. Comments Received**

In response to the proposed rescission notice, the Commission received five comments, offering conflicting opinions.<sup>4</sup> The National Federation of Independent Business (“NFIB”), which had commented on the initial Notice, supported the proposed rescission, commenting that “federal agencies should refrain from imposing unwarranted burdens on the American people and revoke unnecessary regulation.” AmericanHort, an industry association representing nursery growers, greenhouses, and other garden retailers, supported retaining the Guides but also noted that “the overall need for the Guides has perhaps diminished somewhat based on the general evolution of consumer protection mechanisms in our society.”

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<sup>4</sup> The comments, which can be found at <https://www.ftc.gov/policy/public-comments/2018/09/initiative-770>, included AmericanHort (#00007), NFIB (Nat’l Fed’n of Independent Business) (#00005), Lerner (#00004), Smith (#00003), and Harrod (#00002).

Three individual commenters opposed rescinding the Guides. Commenter Harrod argued that, “due to the dishonest nature of some people,” the Guides will always be needed. The commenter also asserted that rescission would imply that it is “now okay to deceive people to make money.” Similarly, commenter Lerner explained that the “average nursery consumer lacks the expertise to identify species of plants” and suggested the lack of complaints may be due to the Guides’ effectiveness.<sup>5</sup>

Although AmericanHort downplayed the Guides’ overall necessity, it singled out the wild plant guidance (16 CFR 18.6) as particularly important. That section indicates that marketers should not sell plants collected from the wild without disclosing that fact.<sup>6</sup> The provision further advises that nurseries may identify plants “propagated” from lawfully-collected wild plants as “nursery-propagated.” AmericanHort explained that, while this guidance involves a relatively narrow issue, it is a “critical element of industry guidance” developed following negotiations between industry and conservation groups in the early 1990s. AmericanHort expressed concern this guidance would be lost if the Commission discontinues the Guides.<sup>7</sup>

### **III. Rescission of the Guides**

The Commission has decided to rescind the Guides because they no longer appear necessary. In reaching this conclusion, the Commission has considered the comments

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<sup>5</sup> Commenter Smith also opposed rescission without elaboration.

<sup>6</sup> Section 18.6 (“Plants collected from the wild state”) reads: “It is an unfair or deceptive act or practice to sell, offer for sale, or distribute industry products collected from the wild state without disclosing that they were collected from the wild state; *provided, however*, that plants propagated in nurseries from plants lawfully collected from the wild state may be designated as ‘nursery-propagated.’”

<sup>7</sup> Harrod, who supported retention, added that wild plants “rarely prosper for a prolonged period of time.”

received, the prevalence of practices covered by the Guides, the industry's use of the Guides, and the Commission's ability to address deceptive practices through enforcement actions or issuance of other educational materials in the Guides' absence. As discussed below, FTC staff can provide guidance and business education regarding the advertising of wild plants.

The record indicates that the types of practices addressed in the Guides are not prevalent in the nursery industry. The Guides focus on misrepresentations about species, size, rate of growth, and other plant characteristics. Neither the comments nor consumer complaints provide evidence that these types of deceptive practices are prevalent. Indeed, as discussed in the NPRM, nearly all recent complaints received by the Commission regarding plant sales involve online plant orders that were either dormant or dead upon arrival, incomplete, not delivered in the time promised (or at all), or not refunded upon request.<sup>8</sup>

Furthermore, with the exception of guidance on wild plants, the Commission lacks clear evidence that industry members currently use the Guides to help avoid deceptive practices. AmericanHort acknowledged that the need for the Guides has "perhaps diminished" over the years. As noted in the NPRM, FTC staff found no mention of the Guides on websites for industry associations, nurseries, or other industry entities.

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<sup>8</sup> The Guides address some of the practices identified in the complaints indirectly or in limited ways. For instance, § 18.1(c)(2) states it is deceptive to represent "[t]hat industry products are healthy . . . when such is not the fact." In addition, some complaints involve incorrect orders, which are covered by § 18.1(a). The Commission sees no need to maintain the Guides to address these limited issues and has found no basis to amend the Guides to address other Section 5 violations, such as the failure to deliver products.

The Guides do not appear to add substantially to general FTC guidance on deceptive practices under the FTC Act.<sup>9</sup> The current provisions focus on misrepresentations about plant characteristics and generally address claims that are clearly deceptive on their face, and thus unambiguously addressed by Section 5 of the FTC Act. In contrast, most of the agency's Guides address difficult implied claims, thus providing valuable information to help businesses avoid deception and substantiate claims that might otherwise lead to consumer confusion (*e.g.*, the Green Guides in 16 CFR Part 260). Given AmericanHort and Harrod's comments about the usefulness of the Guides' wild plant section, the FTC staff will continue to provide business guidance on this topic through its online Business Center, which contains plain-language advice to help businesses understand their responsibilities and comply with the FTC Act.<sup>10</sup> This will ensure the wild plant guidance remains available to industry while also giving the FTC flexibility to update such guidance as needed.

Finally, contrary to a few commenter suggestions, the Guides' rescission will not impact sellers' obligations to avoid deceptive practices and otherwise comply with the law, nor will it impact the FTC's ability to address deceptive practices in the nursery industry. The Guides themselves are not rules. Instead, they contain interpretations of how the Commission would apply the FTC Act to nursery practices. Therefore, their rescission has no effect on existing obligations. Moreover, rescission does not signal an FTC withdrawal from efforts to prevent deception in the labeling and advertising of these products.

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<sup>9</sup> Section 5 of the FTC Act, 15 U.S.C. 45(a)(1), prohibits unfair or deceptive acts or practices in or affecting commerce. See FTC Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 175 (1984) ("Deception Policy Statement").

<sup>10</sup> See <https://www.ftc.gov/tips-advice/business-center/guidance>.

Industry members must continue to follow the law articulated in pertinent Commission and court decisions, both of which are generally applicable to all industries. Industry should also consult the FTC's Policy Statement on Deception for guidance, which describes how the Commission applies established legal principles to address deceptive trade practices. As stated in the Deception Statement, the Commission "will find deception if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."<sup>11</sup> If the Commission determines that certain practices in the sale of outdoor plants are materially misleading, it can continue to address such practices through enforcement actions under Section 5 of the FTC Act.

#### **List of Subjects in 16 CFR Part 18**

Advertising, Nursery, Trade practices.

#### **PART 18 [REMOVED]**

For the reasons stated in the preamble, and under the authority of 15 U.S.C. secs. 5, 6, and 18, the Federal Trade Commission amends 16 CFR by removing part 18.

By direction of the Commission, Commissioners Chopra and Slaughter dissenting.

Julie A. Mack,  
Acting Secretary.

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<sup>11</sup> Deception Policy Statement, 103 F.T.C. at 175.

